

SYLVIA M. BOWER
Claimant

Docket No. 1,013,967

MERCY HEALTH SYSTEM OF KANSAS
Respondent
Self-Insured

¹ Order (April 8, 2004).

Conversely, claimant argues that her work activities either caused or aggravated her upper extremities and neck conditions and, therefore, the ALJ's Order should be affirmed.

Accordingly, the sole issue for the Board's review is whether claimant has proven personal injury by accident arising out of and in the course of her employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.² "‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”³

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.⁴ Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.⁵

Claimant has personal medical problems that are unrelated to the series of work-related accidents alleged in this case. Nevertheless, it is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁶ "The test is not whether the job-related activity or injury caused the condition but whether the job related activity or injury aggravated or accelerated the condition.”⁷

Claimant has worked for respondent over 20 years. Claimant alleges injuries to her "[b]ilateral upper extremities and neck" from "[r]epetitive use of [her] upper extremities"

² K.S.A. 44-510(a); *See also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P. 2d 871 (1984).

³ K.S.A. 44-508(g); *See also in re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

⁵ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

⁶ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

beginning "[o]n or about January, 2003 and each and every workday thereafter[.]"⁸ During 2003 and 2004 her job was primarily to work the switchboard.

During the preliminary hearing claimant testified that in January of 2003 she began shredding documents as a part of her job. Although there is some dispute concerning how many hours per week claimant spent shredding documents, the fact that she performed this repetitive activity is not denied. Claimant described doing this activity almost daily. Claimant's supervisor, who did not testify, stated in an e-mail that claimant ". . . was doing shredding [sic] only on alternate weekends[.]"⁹ Claimant said it was about March 2003, when she started noticing severe pain in her right hand. During the course of shredding, she noticed that her ". . . whole side of my arm up to my neck was getting very uncomfortable."¹⁰ Eventually, her symptoms involved both hands, both forearms, both shoulders and up into her neck on both sides.

Claimant first sought medical treatment on her own with orthopedic surgeon Virendra C. Patel, M.D., on March 27, 2003, and again on April 17, 2003. His impression was right carpal tunnel syndrome. Thereafter, she was sent by respondent to Kenneth W. Johnson, M.D., a physiatrist, on May 29, 2003. At that time her complaints were limited to her right hand and arm. Claimant related the date of onset of her symptoms as January of 2003. She attributed her symptoms to the shredding activity at work. Dr. Johnson diagnosed right wrist extensor and flexor tendinitis, mild right carpal tunnel syndrome and CMC joint arthritis of the right thumb. He recommended non-steroidal anti-inflammatory medications and exercises. Claimant returned to Dr. Johnson on August 4, September 3, and September 22, 2003. Dr. Johnson's records contain no mention of left upper extremity complaints nor neck symptoms. Dr. Johnson recommended claimant see an orthopedic physician for possible injections for the right thumb.

On January 29, 2004, claimant was seen by Russell J. Green, M.D. She reported pain and numbness in both hands and arms with a loss of grip strength. She described her symptoms as gradually worsening, having started in the right upper extremity and then progressed to the left. Claimant related these symptoms to her work. Claimant also gave Dr. Green a history of having splenic lymphoma cancer that was diagnosed in January 2002 and determined to be in remission as of June 2002. He recommended EMG/NCT and blood tests. The blood tests showed no evidence of rheumatoid disease but did reveal hypothyroidism. The blood tests further showed elevated glucose and elevated hemoglobin, evidencing claimant to be diabetic. The EMG/NCT showed evidence of mild

⁸ K-WC E-1 Application for Hearing (filed Nov. 24, 2003).

⁹ P.H. Trans., Cl. Ex. 1.

¹⁰ P.H. Trans. at 14.

right ulnar neuropathy at the elbow and minimal to mild right carpal tunnel syndrome. In addition, there was a suggestion of multi-level cervical radiculopathy.

Dr. Green concluded that claimant's bilateral upper extremity and neck symptoms were not work-related. Rather, Dr. Green believed them to be the result of claimant's hypothyroidism, diabetes or recurrent non-Hodgkins lymphoma.

At the request of her attorney, claimant was examined by Pedro A. Murati, M.D., a physiatrist, on January 8, 2004. He diagnosed bilateral carpal tunnel syndrome and myofascial pain syndrome affecting her bilateral shoulder girdles and cervical spine. Dr. Murati related these conditions to claimant's work activities with respondent. Neither Dr. Johnson, Patel nor Murati had the benefit of the testing ordered by Dr. Green when they performed their examinations and made their conclusions. However, Dr. Murati issued a followup report, which is not dated, but reads:

I am in receipt of the additional records that you have sent regarding the above named patient. After careful review of these records, I have come to the following conclusion:

The history that I obtained from the patient regarding her work included working as a switchboard operator, typing at shoulder level, and shredding documents on a constant basis. This to me sounds repetitive enough to be not only the initial and probable cause, but at the very least to have caused a permanent acceleration and aggravation of any neuropathic process attributable to diabetes or hypothyroidism.¹¹

Claimant describes shredding several bags of paper approximately every other day during 2003. Respondent disputes this, but presented no sworn witness testimony to contradict claimant's testimony. Dr. Murati apparently utilized claimant's description of her work activities, whereas Dr. Green was provided the memo by claimant's supervisor that represents claimant's job duties to be significantly less repetitive and involve much less shredding than what claimant described. It appears that the ALJ found claimant's testimony credible. Under the circumstances, where the contrary evidence was not given under oath nor subjected to cross examination, claimant's testimony should be given more weight. Claimant denied having upper extremity and neck complaints before January 2003. The onset of claimant's symptoms corresponded with the increase in the repetitive nature of claimant's work, specifically the addition of shredding documents to her other duties.

Therefore, the Board finds that it is more probably true than not true that claimant's job activities aggravated and accelerated her bilateral upper extremity and neck conditions. Accordingly, based on the record compiled to date, claimant has met her burden of proving

¹¹ P.H. Trans., Cl. Ex. 3.

that she has suffered repetitive use injuries that arose out of and in the course of her employment with respondent.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated April 8, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2004.

BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Leigh C. Hudson, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director